

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

MIGUEL PULIDO ROMERO,)	No. CV-F-05-1016 REC
)	(No. CR-F-03-5373 OWW)
)	
Petitioner,)	ORDER DIRECTING PETITIONER
)	TO NOTIFY COURT THAT MOTION
vs.)	BE RECHARACTERIZED AS MOTION
)	PURSUANT TO 28 U.S.C. § 2255
)	OR TO WITHDRAW MOTION
)	
UNITED STATES OF AMERICA,)	
)	
)	
Respondent.)	
)	
)	

On August 5, 2005, petitioner Miguel Pulido Romero, proceeding in pro per, filed a "Motion to Dismiss or Review to Adjust Sentence, For Lack of Territorial Jurisdiction."

Petitioner was charged in Count One with conspiracy to distribute and possess with intent to distribute methamphetamine and aiding and abetting, and in Count Two with possession of methamphetamine with intent to distribute and aiding and abetting. Petitioner pleaded guilty to Count One pursuant to a written plea agreement. The plea agreement provided in pertinent part:

1 2. Agreements by the Defendant.

2 ...

3 (d) The defendant is aware that
4 Title 18, United States Code, Section 3742
5 affords a defendant the right to appeal the
6 sentence imposed. Acknowledging this, the
7 defendant knowingly waives the right to
8 appeal his conviction or any sentence which
9 is in accordance with the maximum provided in
10 the statute(s) of conviction (or the manner
11 in which that sentence was determined) on the
12 grounds set forth in Title 18, United States
13 Code, Section 3742 or on any other ground
14 whatever, in exchange for the concessions
15 made by the United States in this plea
16 agreement. The defendant also waives his
17 right to challenge his conviction, sentence
18 or the manner in which it was determined in
19 any post-conviction attack, including but not
20 limited to a motion brought under Title 28,
21 United States Code, Sections 2241 or 2255.

22 ...

23 5. Factual Basis.

24 The defendant will plead guilty because he is
25 in fact guilty of the crime set forth in the
26 Superseding Information, Cr.F.No. 03-5373
27 REC. The defendant also agrees that his
28 guilty plea will be based upon the following
29 facts, although he acknowledges that, as to
30 other facts, the parties may disagree:

31 Beginning at a time unknown, but no
32 later than on or about September 21, 2003,
33 and continuing to on or about September 22,
34 2003, within the State and Eastern District
35 of California, and elsewhere, defendant
36 Miguel Pulido Romero did knowingly and
37 intentionally agree and conspire with Sergio
38 Martinez Galindo, Arturo Reyes Gutierrez and
39 others to possess and distribute over 500
40 grams or more or a mixture or substance
41 containing a detectable amount of
42 methamphetamine, a Schedule II controlled
43 substance. Specifically, on September 22,
44 2003, a DEA Confidential Source and DEA
45 Special Agent Eduardo Chavez, acting in an

1 undercover capacity, met with Galindo,
2 Gutierrez, and defendant Pulido Romero at a
3 Denny's Restaurant parking lot in
4 Bakersfield, California, for the purpose of
5 consummating a narcotics transaction. Prior
6 to this meeting, an informant had negotiated
7 with Galindo for the purchase of six (6)
8 pounds of crystal methamphetamine for
9 \$24,000. Galindo had told informant that he
10 was traveling with an individual named
11 'Ricardo' (identified as Gutierrez) and
12 another individual nicknamed 'Guero' (later
13 identified as the defendant, Pulido Romero).

14 That afternoon, co-defendants
15 Galindo and Gutierrez arrived at the Denny's
16 parking lot in a blue station wagon. The
17 informant and agent Chavez met with them.
18 Defendant Pulido Romero walked over to meet
19 the group. When the informant asked to see
20 the merchandise, Galindo directed Gutierrez
21 to bring the blue station wagon and park it
22 near defendant Pulido Romero's green
23 Thunderbird. Agent Chavez observed Pulido
24 Romero reach into the driver's window, stop
25 the engine, and open the trunk and hood of
26 the Thunderbird. Gutierrez parked the
27 station wagon near the Thunderbird while
28 Galindo opened the hoods of both vehicles as
29 if to give the impression that they were
30 attempting to jump start the car.

31 Agent Chavez walked to the trunk of
32 the car and asked Pulido Romero if the
33 'stuff' was in the trunk. He said no and
34 pointed towards the hood of the vehicle.
35 Agent Chavez walked to the front of the Ford
36 Thunderbird and observed Galindo opening the
37 air filter portion of the engine. The agent
38 then saw six off-white oval size objects
39 wrapped in saran wrap, which chemical
40 analysis showed contained approximately 2,420
41 grams of methamphetamine.

42 Pulido Romero gave a false name
43 when he was arrested. A fingerprint check
44 revealed his true identity. At the time,
45 defendant Pulido Romero knew that
46 methamphetamine was a controlled substance.

47 Petitioner was sentenced by Judge Robert Coyle on May 17, 2004 to

1 120 months imprisonment, the mandatory minimum for the crime to
2 which petitioner pleaded guilty.¹ No appeal was filed.

3 In the instant motion, petitioner "demands of this
4 legislative tribunal assembly the dismissal of this cause because
5 of the lack of exclusive jurisdictional authority over the exact
6 geographical location where the alleged criminal activity
7 mentioned in the indictment took place" and further demanding

8 of this court to establish the required
9 exclusive Federal Jurisdiction that have been
merely assumed in this matter, consisting of:

10 1. Documentation showing ownership of each
11 and every geographical location mentioned in
the instant indictment wherein the alleged
12 criminal activity took place.

13 2. Documentation for legislature of the
14 State of CALIFORNIA, surrendering
jurisdiction to the Federal government over
15 the same geographical location as in '1.
[sic]

16 3. Documentation pursuant to Title 40 U.S.C.
17 § 255, wherein the United States accepted
jurisdiction to the same geographical
18 location as specified in #1, or documentation
showing concurrent jurisdiction with the
19 states over the geographical location in #1
....

20 Alternatively, the motion requests the court to reconsider the
21 sentence imposed on him, contending that he is a young man, who
22 has tried his best in prison, that this is his only crime, that
23 he has a family to support which caused him to come to the United
24 States for work, and that the court "now [has] the ability to

25 ¹Further proceedings in the underlying criminal action were
26 transferred to the docket of Judge Oliver Wanger by order filed on
May 31, 2005.

1 have the 'sentence be given to fit the crime,' because of the new
2 Supreme Court Rulings, in BOOKER and BLAKELY."

3 As a general rule, challenges to the legality of a federal
4 conviction and sentence must be brought pursuant to 28 U.S.C. §
5 2255 while challenges to the manner of execution of the sentence
6 must be brought pursuant to 28 U.S.C. § 2241. United States v.
7 Giddings, 740 F.2d 770, 772 (9th Cir. 1984).² Here, petitioner
8 challenges the legality of his conviction and sentence.

9 In United States v. Seesing, 234 F.3d 456, 464 (9th Cir.
10 2000), the Ninth Circuit holds:

11 When presented with a pro se motion that
12 could be recharacterized as a 28 U.S.C. §
13 2255 motion, a district court should not so
14 recharacterize the motion unless: (a) the pro
15 se prisoner, with knowledge of the potential
16 adverse consequences of such a
17 recharacterization, consents, or (b) the
18 district court finds that because of the
19 relief sought that the motion should be
20 recharacterized as a 28 U.S.C. § 2255 motion
21 and offers the pro se prisoner the
22 opportunity, after informing the prisoner of
23 the consequences of recharacterization, to
24 withdraw the motion. Under either scenario,
25 the pro se prisoner has the option to
26 withdraw the motion and file one all-
inclusive 28 U.S.C. § 2255 motion within the
one-year statutory period.

21 Therefore, before recharacterizing the instant motion as a
22 motion for relief pursuant to Section 2255, the court advises
23 petitioner that such a motion Section 2255 has a one-year

24 ²Petitioner cannot obtain the relief sought by this motion
25 pursuant to Rule 35, Federal Rules of Criminal Procedure, or
26 pursuant to 18 U.S.C. § 3582(c) because he does not meet the
criteria for reconsideration of an imposed sentence set forth
therein.

1 limitation period. This limitation period runs from the latest
2 of:

3 (1) the date on which the judgment of
4 conviction becomes final;

5 (2) the date on which the impediment to
6 making a motion created by governmental
7 action in violation of the Constitution or
8 laws of the United States is removed, if the
9 movant was prevented from making a motion by
10 such governmental action;

11 (3) the date on which the right asserted was
12 initially recognized by the Supreme Court, if
13 that right has been newly recognized by the
14 Supreme Court and made retroactively
15 applicable to cases on collateral review; or

16 (4) the date on which the facts supporting
17 the claim or claims presented could have been
18 discovered through the exercise of due
19 diligence.

20 Because petitioner's conviction and sentence became final on May
21 27, 2004, petitioner must demonstrate that the one-year
22 limitation period on the claims for relief asserted in the
23 instant motion commenced to run after May 27, 2004 and within the
24 meaning of the accrual dates set forth above. Alternatively,
25 petitioner must demonstrate by specific facts that he is entitled
26 to equitable tolling of the one-year limitation period. In
Calderon v. U.S. Dist. Court for Central Dist. of Cal., 128 F.3d
1283 (9th Cir. 1997), cert. denied, 522 U.S. 1099 and 523 U.S.
1061 (1998), overruled on other grounds, 163 F.3d 503 (9th Cir.
1998), the Ninth Circuit held that the one-year limitations
period applicable to Section 2255 motions is subject to equitable
tolling. However, the Ninth Circuit further held:

1 Equitable tolling will not be available in
2 most cases, as extensions of time will only
3 be granted if 'extraordinary circumstances'
4 beyond a petitioner's control make it
5 impossible to file a petition on time ... We
6 have no doubt that district judges will take
7 seriously Congress's desire to accelerate the
8 federal habeas process, and will only
9 authorize extensions when this high hurdle is
10 surmounted.

11 Id. at 1288-1289. In addition, petitioner is advised that the
12 failure to assert all claims for relief in a recharacterized
13 Section 2255 motion can result in the later preclusion such
14 claims in a "second or successive" Section 2255 motion.

15 ACCORDINGLY:

16 1. Petitioner is hereby notified that the court finds that
17 the instant motion should be recharacterized as a motion for
18 relief pursuant to 28 U.S.C. § 2255. Petitioner may withdraw the
19 motion if he does not wish to pursue relief under Section 2255.
20 Should petitioner choose to withdraw the motion, he must file a
21 notice of withdrawal of the motion within 30 days of the filing
22 date of this order. If petitioner fails to file the notice of
23 withdrawal within 30 days, the motion shall be adjudicated as a
24 motion for relief under Section 2255.

25 2. If petitioner decides to proceed pursuant to Section
26 2255, he must file an amended Section 2255 motion within 30 days
of the filing date of this order setting forth all claims upon
which he bases relief, the facts upon which he relies in
contending that the claims in the Section 2255 motion are not
time-barred and/or that petitioner is entitled to equitable

1 tolling. Failure to timely comply will result in the dismissal
2 of the Section 2255 motion as time-barred.

3 IT IS SO ORDERED.

4 **Dated: August 15, 2005**
668554

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE